Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MICHAEL FULLENKAMP, et al.,
Petitioners,

v.

MIKE JOHANNS, in his capacity as Secretary of the United States Department of Agriculture,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether it is ever appropriate under a *Chevron* step one analysis for a reviewing court to accept an agency's statutory construction that renders parts of the statute superfluous when a plain meaning reading of the statute gives meaning to all words?

PARTIES TO THE PROCEEDINGS WITH RULE 29.6 STATEMENT

Petitioners herein, the plaintiffs and appellants below, include the following persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, nonwholly owned subsidiaries or other legal entities who or which are financially interested in the outcome of the litigation: Michael Fullenkamp, Baca Linda Dairy, L.L.C., Back Nine Dairy, Baird Farms, Inc., Barbland Farms, Inc., Beck Farms, L.P., Boersma's A & T Dairy, Bridgewater Dairy, L.C., Chaput Family Farms, William J. Cook, County Line, Bill Davis, den Dulk Dairy Farm, L.L.C., Diamond K Dairy, Inc., D & J Dairy (Idaho), D & J Dairy (Texas), Fair Oaks Dairy Farm, L.L.C., Fessenden Dairy, L.L.C., Larry E. Greden, Gore, Inc., Hardie Farms, Inc., Herrema Dairy, L.L.C., Hidden View Dairy, L.L.C., High Hill Dairy, Highland Dairy, Holsum Dairies, L.L.C., J & D Star Dairy No. 1, J & D Star Dairy No. 2, Kline Enterprises, Lueck Dairy, LVBD, LVDVD, L.C., Meadow Rock Dairy Farm, L.L.C., Merrell Farms, L.L.C., Milk Train, Inc., Newberry Farms, L.L.C., Oakwood Dairy, L.L.C., Odyssey Farm, Ostermann Dairy, Inc., Patterson Farms, Inc., Pine Hollow Dairy, Powerline Dairy, Rich-Lane Farms, Rio Grande Dairy, LC, Rising Sun Dairy, Salt Ridge Dairy, Sandy Ridge Dairy, SDR Dairy, Ltd. Co., Smith's Incredibull Farms, Sonora Desert Dairy, Michael P. Sumners, Tuls Dairy Farms, Venice View Dairy, L.L.C., Willet Dairy, L.L.C., and Windy Ridge Dairy, L.L.C. They will be referred to as "Dairy Farmers" in the case.

The Respondent herein is Mike Johanns in his official capacity as the Secretary of the United States Department of Agriculture. In the courts below the named Defendant and Appellee was his predecessor, Ann Veneman, in her capacity as the Secretary.

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Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to resolve a conflict among the circuits.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Daughtrey, Gibbons, and Cook, Circuit Judges) is reported at *Fullenkamp v. Veneman,* 383 F.3d 478 (6th Cir. 2004). App., *infra*, 1a. The decision of the United States District Court for the Northern District of Ohio (Hon. Ann Aldrich) was not reported. App., *infra*, 15a.

JURISDICTION

The judgment sought to be reviewed in this case was issued September 2, 2004. The order denying a timely petition for rehearing and suggestion for rehearing *en banc* was issued January 6, 2005. App., *infra*, 40a. The statutory basis for the issuance of this writ is 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent parts of the Farm Security and Rural Investment Act of 2002 are reproduced at App., *infra*, 42a. Pub. L. No. 107-171, § 1502 116 Stat. 134, 205 (2002) ("National Dairy Market Loss Payments," codified at 7 U.S.C. §7982).

The pertinent text of the regulations, Milk Income Loss Contract Program, 7 C.F.R. Part 1430, Subpart B is set forth at App., *infra*, 46a.

STATEMENT OF THE CASE

This case raises important and recurring questions concerning the breadth of the tools available to a court interpreting a statute under *Chevron's* step one. The court below had before it two constructions of the Act. One construction was derived without deviation from the language of the statute. The other construction, advanced by the agency, rendered parts of the statute superfluous.

Chevron, USA Inc. v. Nat. Resources. Def. Council, 467 U.S. 837 (1984) sets forth the familiar principle that agency interpretation is entitled to deference where a statute is ambiguous. Under step one of this analysis, the reviewing court is called upon to determine whether the statute is ambiguous. Only upon a finding of ambiguity may the second step of the analysis be undertaken to determine whether the agency's interpretation is permissible. *Chevron*, 467 U.S. at 842-43. The case at bar reflects ongoing confusion and disharmony among the federal circuits as to how to assess whether ambiguity exists at step one of a *Chevron* analysis. The court below went beyond a plain meaning analysis and used broad policy considerations to find ambiguity under the first step. This approach is in conflict with other circuits which have adhered more closely to a pure textualist approach as suggested by this Court in cases such as *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002).

The court of appeals had jurisdiction over this case under 28 U.S.C. § 1291. It affirmed a decision of the district court which had jurisdiction under 28 U.S.C. § 1331 and 1337(a) because the claim arose under the laws of the United States (to wit, 7 U.S.C. § 7982), and pursuant to 28 U.S.C. §1346 because an officer and agency of the United States was a proper

party defendant (the Secretary of Agriculture in his official capacity).

A. Congressional action provides dairy income loss protection.

In 2002 Congress passed the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002) ("Act"). Along with other programs, the Act created a counter cyclical payment program for dairy farmers. *Id.* §1502 (codified at 7 U.S.C. § 7982). App. *infra*, 42a. Known as the Milk Income Loss Program, the Act required the Secretary to enter into contracts with producers on a dairy farm under which they would receive payments on milk produced if monthly prices fell below an established level. 7 U.S.C. § 7982(b). The Act contemplated two distinct payments to producers, as the Court of Appeals explained:

> Once a dairy farmer has entered into a contract, the farmer is eligible for two categories of payments: (1) monthly payments on eligible production beginning the month the farmer enters into the contract and ending September 30, 2005, *see* 7 U.S.C. § 7982(g); and (2) a retroactive, lump-sum payment for production during the "transition" period between December 2001 and the month in which the farmer enters the contract. *See* § 7982(h). The statute does not specify a month in which dairy farmers must enter contracts, just that the Secretary must offer such contracts from July 2002 until September 2005. *See* 7 U.S.C. § 7982(f).

App., *infra*, 2a-3a.

Congress carefully articulated two distinct and mutually exclusive payment categories and the time periods governing each payment. Though the Act identifies the first month for the Transition Rule payment and the last month for the contract payment (December 2001 and September 2005, respectively) the Act does not specify the specific month in which the initial Transition Rule period ends and the Contract period begins. Rather, the Act gives each individual producer the ability to choose this changeover month. By law, the first month available for a changeover was July 2002. 7 U.S.C. § 7982(f) ("60 days after May 13, 2002"). *See* 7 U.S.C. § 7982(e), (g), (h). The last month is September 2005. 7 U.S.C. § 7982(f).

This distinction between the two payments is further highlighted by Congress's instruction that the Transition Payment is to be made,"[in] addition to any payment that is otherwise available." 7 U.S.C. § 7982(h). The parties agree that there are two distinct payments under the Act. The disagreement concerns whether both are subject to a payment limitation.

On its face, the Act provides a dairy producer with a single lump sum Transition Payment on all eligible production for the period ending when the producer enters into the contract.

The Act also provides for monthly payments that begin after the Transition Payment is made. These monthly payments, "under subsection (b)" are expressly subject to a cap and producers are not paid for milk production that exceeds 2,400,000 pounds per fiscal year. 7 U.S.C. § 7982(d)(2).

The statute states that this cap applies only to payments "under subsection (b)" which implies that there are payments that are not under that subsection. Congress could have used the phrase "under this section" to bring both the monthly payments under subsection (b) and the Transition Payment under subsection (h) within the cap. It did not.

Elsewhere in the Act, Congress specifically utilized the differing terms "section" and "subsection." For example, in subsection (d)(1) the Act defined payment quantity generally for "payments under this *section*." (emphasis added). In subsection (d)(2) it speaks of a limitation on payment quantity for "payments under *subsection* (b)." (emphasis added). Similarly, the Act references "payments under this *section*" in subsection (c).

B. The Secretary's regulations did not reflect the plain language of the Act.

The Secretary promulgated regulations implementing the Act. 67 Fed. Reg. 64454, 64476-80 (October 18, 2002), 7 C.F.R. Part 1430.200 *et. seq.*, App., *infra*, 46a. These regulations applied the payment quantity limitation applicable to "payments under subsection (b)" to the Transition Payments made under subsection (h). 7 C.F.R. § 1430.206 (b)(1), 1430.207(b). App., *infra*, 55a. Further, the Secretary forced producers to choose either a Transition Payment or a contract payment when signing up, despite the language in the Act defining the Transition Payment as one "in addition to *any other* payment available under this section." *cf.* 7 U.S.C. § 7982(h) *with* 7 C.F.R. § 1430.207 (c). (emphasis added).

C. Dairy Farmers challenged the Secretary's regulations.

Dairy Farmers commenced this suit to compel the Secretary to offer payments in accordance with the plain language of the statute and offer producers the option to obtain an uncapped lump sum payment for the Transition Period in lieu of capped monthly payments.

The District Court denied Dairy Farmers' motion for summary judgment and granted the Secretary's motion to dismiss. App., *infra*, 15a. The District Court held that "there was a logical support for the dairy producers argument the cap does not apply to Transition payments" but elsewhere held that the Act did not "unambiguously forbid" the Secretary's interpretation. App., *infra*, 31a.

Dairy Farmers timely appealed to the United States Court of Appeals for the Sixth Circuit. On September 2, 2004, the Court of Appeals affirmed the decision of the District Court. App., *infra*, 1a. In that decision, the Court of Appeals stated, *inter alia*:

> Focusing on the statutory language, we conclude that it is unclear whether the phrase "payments under subsection (b)" includes transition payments or not. As the defendant points out, transition payments are received only if the dairy farmers enter into contracts and, therefore, such payments can be seen to be payments under subsection (b). At the same time, as noted by the plaintiffs, this interpretation does render the phrase "subsection (b)" superfluous. Furthermore, when subsection (e) refers to "a payment under a contract under this section," it is referring to the monthly payments, thereby implying

> that transition payments are not considered payments under § 7982 contracts. In short, we conclude that although Congress may have had an intent regarding whether transition payments were "under subsection (b)," that intent is not stated clearly in the language of the statute.

App., *infra*, 9a-10a. The court did not explain how it was appropriate to adopt a statutory construction which it agreed rendered some parts of the Act superfluous under *Chevron's* step one. Despite the deficiency found in the Secretary's regulations, the Court found the Secretary's decision to cap the transition payment "eminently reasonable." App., *infra*, 13a.

A timely petition for rehearing and suggestion for hearing *en banc* was denied on January 6, 2005. App., *infra*, 40a.

D. In addition to the *Chevron* issues created by the Sixth Circuit's analysis, resolution of this issue impacts dairy producers nationally.

More than the petitioners are harmed by the decision below. The practical effect of a cap of 2.4 million pounds per year means that a dairy farm with 130 cows or more would not be compensated on all of the milk produced on that farm during the Transition Period. In its annual report for 2004, USDA identified 7695 producers with 200 or more cows and10,445 producers with 100 to 199 cows. Dairy producers with more than 130 cows are located in most, if not all states. USDA NASS, *Farms, Land in Farms, and Livestock Operations: 2004 Summary*, 24-31(January 2005). Over half of the milk produced in the nation will be subject to a cap interposed by the Secretary but not the Congress. The loss to these dairy farmers as a result of the Secretary's faulty

interpretation is approximately $2 billion for the period of the Act.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's *Chevron* step one analysis illustrates a conflict with decisions of this Court and other circuits regarding the scope of statutory construction.

The Sixth Circuit decision upholds an agency interpretation that renders portions of the statute superfluous. The court confirmed its holding by looking at statutory history to see if it clearly indicated an intention of Congress. Seeing nothing in the history it deferred to the agency decision under step two of Chevron. This decision exemplifies the conflict and confusion in the circuits regarding the scope of statutory construction available to the courts in step one of a *Chevron* analysis.

Congress put every word in the statute and the courts should give each of them meaning. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). (It is "a cardinal principle of statutory construction [that] a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")

The court below recognized *Chevron's* directive that,"If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron,* 467 U.S. at 843 (emphasis added). App., *infra*, 6a. *See also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739(1989) ("The starting point for [the] interpretation of a statute is always its language."); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

("[Courts] must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Clark v. Martinez*, ___ U.S. ___, 125 S.Ct. 716, 736 (2005) ("Application of those traditional tools begins and ends with the text of [the statute]," (Thomas, J., *dissenting* with Renhquist, C.J.)

References to *Chevron* and its familiar two-step inquiry are ubiquitous in administrative law cases but there is no consistency among the circuits as to the scope of the traditional tools that may be employed in step one, specifically, whether it is appropriate to look beyond the text of the statute itself. The Sixth Circuit used legislative history to confirm ambiguity, while other circuits have stated clearly the outer bounds of step one as being the language of the statute.

A. The Sixth Circuit's approach conflicts with the sister circuits and this Court.

The *Chevron* question presented below is whether Congress stated that the lump sum Transition Payments were subject to an annual limitation on eligible production. The text of the Act answers the question in the negative. The agency suggested a different interpretation which said there was such a cap. In accepting the agency's answer, the Sixth Circuit ignored a purely textual interpretation, ignored phrases and words altogether, and ignored the structure of the statute. The Court justified the agency interpretation by utilizing "traditional tools" including statutory history to justify the Secretary's interpretation. This approach exposes a conflict in the circuits as to when, if ever, a court may look beyond the text of the statute in the first step of the *Chevron* analysis.

The Second Circuit has noted that this Court "has issued mixed messages as to whether a court may consider legislative history [in the first step of a *Chevron* analysis]." *Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118, 127 n. 3 (2d Cir. 2004). In *Coke*, the Second Circuit looked to legislative history "to check our understanding and determine whether there is a clearly expressed intention by the Congress which is contrary to the plain language of the statute." *Id.* This contrasts with the Sixth Circuit, which used the legislative history to see if Congress had indicated whether the Secretary's interpretation was contrary to its intent, as if a plain reading of the statutory text were not sufficient. This approach differs from those adopted by other circuits and further demonstrates the need to clarify the law.

The Ninth Circuit describes the conflict as a contest between "plain meaning" and the use of statutory tools. *Rivers v. F.E.R.C.*, 187 F.3d 1007, 1016 n. 16 (9th Cir. 1999) ("We acknowledge the debate over the propriety, under *Chevron*, of venturing beyond plain meaning analysis and resorting to traditional implements of statutory construction to ascertain a clear congressional directive.")

In the Seventh Circuit, reference to the legislative history should only be in step two. *United Transp. Union-Illinois Legisl. Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 613 (7th Cir. 1999). ("Under the first step of a *Chevron* analysis, courts do not defer to even reasonable agency interpretation if "Congress has spoken directly to the precise point at issue," i.e.,if the statutory language, with or without the support of legislative history, is clear, unambiguous, and directly governs the challenged decision.") The Seventh Circuit views reliance on the legislative history as simply problematic. *Bd. of Trade of City of Chicago v. S.E.C.* 187 F.3d 713, 720 (7th Cir. 1999) ("Legislative history is problematic under the best

circumstances, and even so reliable a source as the Conference Committee Report may be used only when there is a genuine ambiguity in the statute.") *Citing Barnhill v. Johnson*, 503 U.S. 393, 401 (1992).

The Eighth Circuit is in accord with the Seventh. In *U.S. v. Sabri*, the court stated, "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." 326 F.3d 937, 943-45 (8th Cir. 2003) *quoting United States v. Albertini*, 472 U.S. 675, 680 (1985) (internal quotation omitted).

The approach of the Seventh and Eighth Circuits is consistent with this Court's instruction in *Sigmon Coal* but is in direct conflict with the Sixth Circuit's use of an extratextual approach in step one.

The First Circuit considers legislative history in the step one analysis of *Chevron* "where appropriate to discern and/or to confirm legislative intent." *Succar v. Ashcroft,* 394 F.3d 8, 31 (1st Cir. 2005). In *Succar* it was noted that "If the language of the statute is plain and admits of no more than one meaning *or if the statute's legislative history* reveals an unequivocal answer as to the statute's meaning, we do not look to the interpretation that may be given to the statute by the agency charged with its enforcement") (*quoting Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998)) (emphasis in *Succor*). This differs from the Sixth Circuit in that it still relies primarily upon plain meaning and only in textual inadequacy does it resort to legislative history.

Similarly, the Eleventh Circuit will rely on legislative history in the first step "to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong

presumption that Congress expresses its intent through the language it chooses." *Legal Envtl. Assistance Found., Inc. v. E.P.A.*, 118 F.3d 1467, 1475-76 (11th Cir. 1997) quoting *I.N.S.. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987).

Depending on the circuit in which an agency challenge is initiated, the analysis will vary and the end result may differ accordingly. These discrepancies affect all cases in with Congress has directed an agency to act and the agency is called to account for its actions.

B. The Sixth Circuit deviated from this Court's holdings when it abandoned a plain meaning interpretation of the statute.

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002) set forth guidelines for a court construing a statute under *Chevron's* first step,

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Id. at 450 (internal quotations and citations omitted).

Implicit in that directive is that if a reading of the text of the statute yields a construction that is unambiguous and gives effect to all words, that construction ends the inquiry. Rather than ending the inquiry after finding an explanation that came only from the entire statute as required by *Chevron*, the court

of appeals considered the Secretary's construction. It then compared the two constructions in this way:

> As the defendant points out, transition payments are received only if the dairy farmers enter into contracts and, therefore, such payments can be seen to be payments under subsection (b). At the same time, as noted by the plaintiffs, this interpretation does render the phrase "subsection (b)" superfluous. Furthermore, when subsection (e) refers to "a payment under a contract under this section," it is referring to the monthly payments, thereby implying that transition payments are not considered payments under § 7982 contracts. In short, we conclude that although Congress may have had an intent regarding whether transition payments were "under subsection (b)," that intent is not stated clearly in the language of the statute.

App. *infra*, 9a-10a. The Sixth Circuit reviewed legislative history to support its contention that the statute was ambiguous. *See* App. *infra*, 10a. Finding "ambiguity" it moved on to the more deferential analysis under *Chevron* step two and concluded that the Secretary's interpretation was reasonable. App. *infra* 10a-13a.

C. This case squarely presents the conflict.

This case gives this Court the opportunity to clearly identify the bounds of statutory interpretation in *Chevron* step one and resolve the conflict in the circuits. The Sixth Circuit itself acknowledges that the Secretary's interpretation renders parts of the statute meaningless.

Review of this case over others is preferable because it does not present any other issues which could dwarf the resolution of the question presented. The issue is purely one of law, and there are no contested facts.

D. The issue presented is recurring and of great practical importance.

The question presented encompasses a constitutional dimension. When a reviewing court resorts to statutory interpretation that renders words superfluous the division of power among the three branches is directly impacted. The executive branch is permitted to substitute its will for that of the legislature. By deferring to such agency action, the judicial branch abdicates its authority to the agency, as well.

The question presented also impacts legislative practicality. By abandoning plain meaning analysis in favor of one that requires a statute to "unambiguously forbid" a certain interpretation, Congress is obligated to not only draft what it wants, but to also list what it does not want. This degree of clarity is beyond the practicality of compromise politics that is the legislative process.

This case also implicates the power of the executive. A willingness to defeat plain meaning by any explanation the agency plausibly provides will require deference in all but the most egregious departures from the statute, if then. When the judiciary so defers to the power of the executive branch, it at the same time reduces the legislature's ability to exercise its political authority.

Below, the Department argued in favor of its regulations on the basis that the plain language interpretation was too costly. The Secretary may not, however, deny Congressionally

mandated aid based on an argument of cost unless Congress so permits. No such permission was granted here. This Court has addressed such issues of executive sequestration and impoundment before and held it impermissible. *Clinton v. City of New York*, 524 U.S. 417, 444 (1998) (holding that line item veto impermissibly allowed the President to substitute his policy decision for that of Congress by canceling a spending item); *Train v. City of New York*, 420 U.S. 35, 41 (1975) (holding the President Nixon could not choose to pay out only two-thirds of the funds authorized by the Federal Water Pollution Control Act of 1972). Here, despite the clear language of the statute mandating uncapped Transition Payments, the Secretary has unilaterally decided to pay only a portion of what Congress requires. The two *City of New York* cases prohibit the Secretary from making this decision.

This case presents the Court with the opportunity to explicitly define the bounds of a step one *Chevron* inquiry and specifically, to set forth a bright-line rule that when a statute can be interpreted in only one way that gives effect to all words in the statute, that interpretation must be accepted.

The recurring comments made in the Circuits indicate an uncertainty as to both whether and, if appropriate, when, to use legislative history and other extratextual tools. *Chevron* has become a centerpiece of administrative jurisprudence.

Proper statutory construction permits only one answer to the question as to whether the transition rule payments are subject to a cap– they are not. After defining eligible production as all production, and equating eligible production with the "payment quantity," Congress limited the payment quantity for "payments under subsection (b)." For this phrase to have meaning, it could not also cover Transition

Payments under subsection (h). The decision below renders meaningless key phrases in the Act and defeats Congress's careful definitions of "eligible production" and "payment quantity." The plain meaning reading of the Act makes this evident, and only the injection of other considerations permitted the court to reach step two of its *Chevron* analysis.

CONCLUSION

The writ should be granted to resolve a conflict among the circuits and to allow this Court to carefully delineate the requirements of a step one analysis under *Chevron*.

Dated: April 6, 2005

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-3731

[Argued: June 17, 2004]
[Decided: September 2, 2004]
[Filed: September 2, 2004]

MICHAEL FULLENKAMP, et al., Plaintiffs-Appellants,

v.

ANN M. VENEMAN, in her capacity as Secretary of the United States Department of Agriculture, Defendant-Appellee.

Before: DAUGHTREY, GIBBONS, and COOK, Circuit Judges.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. The plaintiffs in this case are dairy farmers who annually produce over 2.4 million pounds of milk. They challenge the regulations promulgated by the defendant Secretary of Agriculture to implement the federal Milk Income Loss Contract Program, 7 U.S.C. § 7982. When a producer signs

a contract to join the program, it begins receiving monthly payments on the eligible milk it produces and, under the statute's transition rule, a lump-sum payment for eligible milk it produced between December 1, 2001, and the month before the contract was signed. The statute includes a limitation restricting the quantity of milk upon which payment can be made each fiscal year to 2.4 million pounds. The Department of Agriculture regulations under attack here apply the limitation to payments under the transition rule as well as to the monthly payments. The district court found that the statute did not unambiguously forbid the Secretary's interpretation of the statute and, moreover, that the Secretary's interpretation was reasonable. The court therefore denied the plaintiffs' motion for injunctive relief and granted the Secretary's motion to dismiss.

For the reasons set out below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 13, 2002, President Bush signed into law the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002), which, in § 1502, created an income support program for dairy farmers that provides for direct federal payments to milk producers when a specific statutorily-prescribed price index falls below a certain level. *See id.* at § 1502, codified at 7 U.S.C. § 7982. In order to receive payments through the program, dairy farmers must enter into a contract with the Secretary of Agriculture. Once a dairy farmer has entered into a contract, the farmer is eligible for two categories of payments: (1) monthly payments on eligible production beginning the month the farmer enters into the contract and ending September 30, 2005, *see* 7 U.S.C. § 7982(g); and (2) a retroactive, lump-sum payment for production during the "transition" period between

December 2001 and the month in which the farmer enters the contract. *See* § 7982(h). The statute does not specify a month in which dairy farmers must enter contracts, just that the Secretary must offer such contracts from July 2002 until September 2005. *See* 7 U.S.C. § 7982(f).

Section 7982 reads, in pertinent part:

(b) **Payments.** The Secretary shall offer to enter into contracts with producers on a dairy farm located in a participating State under which the producers receive payments on eligible production.

* * * *

(d) **Payment quantity.**

(1) In general. Subject to paragraph (2), the payment quantity for a producer during the applicable month under this section shall be equal to the quantity of eligible production marketed by the producer during the month.

(2) Limitation. The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments under subsection (b) shall not exceed 2,400,000 pounds. . . .

* * * *

(f) Signup. The Secretary shall offer to enter into contracts under this section during the period beginning on the date that is 60 days after the date of enactment of this Act [May 13, 2002], and ending on September 30, 2005.

* * * *

(h) Transition rule. In addition to any payment that is otherwise available under this section, if the producers on a

dairy farm enter into a contract under this section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) on the quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.

In October 2002, the Secretary of Agriculture issued regulations implementing the dairy assistance program. Under the regulations, the cap in § 7982(d)(2) limiting payment quantity to 2.4 million pounds of milk per year was made applicable to transition period payments under § 7982(h), as well as to the monthly payments for milk produced after a contract has been signed. *See* 7 C.F.R. §§ 1430.207(b). In response, the plaintiffs filed this action, seeking a declaratory judgement that dairy producers who are entitled to payments during the transition period are entitled to a lump-sum payment on *all* the milk produced and marketed during the transition period, not just 2.4 million pounds a year. They requested an injunction compelling the Secretary to modify the regulations at 7 C.F.R. § 1430 to allow dairy producers uncapped transition payments.

The district court denied the plaintiffs' motion for injunctive relief and granted the Secretary's motion to dismiss the case.[1] With respect to the cap on transition payments, the

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[1] The defendant's motion was styled a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56. The district court said it was granting the defendant's motion to dismiss, but also made clear that it was considering the case on the merits and not dismissing based on subject matter jurisdiction. It therefore appears that it was either a dismissal for failure to state a claim or

court found that § 7982 does not unambiguously forbid the regulations from making transition payments subject to the cap and that the Secretary's regulation was permissible and reasonable. Applying *Chevron* deference, the court upheld the Secretary's determination that the cap applies to transition payments as well as prospective payments under the contract. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). This appeal followed.

ANALYSIS

I. Standard of Review

The parties agree that *Chevron*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778, governs this case.[2] Under *Chevron*,

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a grant of summary judgment rather than a dismissal for lack of subject matter jurisdiction. Even if the dismissal were considered a dismissal for lack of subject matter jurisdiction, we can affirm a district court's judgment on any grounds supported by the record. *See Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 394 (6th Cir. 2002).

[2] *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001). In 7 U.S.C. § 7991(c), Congress authorized the Secretary and Commodity Credit Corporation to promulgate appropriate regulations necessary to implement the chapter. It specified that those regulations were to be made without regard to notice and comment rule-making procedures. The regulations at issue in this case, final regulations made without prior notice and comment, were promulgated under

in reviewing an agency's interpretation of a statute it administers, we must first ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If, after "employing traditional tools of statutory construction," *id.* at 843 n.9, we determine that Congress's intent is clear, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also Barnhart v. Thomas*, 540 U.S. 20, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333 (2003) (applying *Chevron*).

II. The Application of the Cap to Transition Payments

Both the plaintiffs and the defendant in this case argue that Congress spoke directly to the issue of whether the payment cap in § 7982(d)(2) applies to transition payments. Obviously, however, they do not agree on what Congress said. The plaintiffs argue that Congress clearly intended that the cap *not* apply to transition payments and that the Secretary's regulations therefore violate the statute. The Secretary, on the other hand, contends that Congress clearly intended that *all* payments under § 7982 would be limited by the cap and that the Department's regulations are consistent with the statute. Both parties argue that the plain language of the statute, legislative history, and the structure and purpose of the statute support their positions.

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the authority given to the Secretary in § 7991(c). *See* 67 Fed. Reg. 64454 (Oct. 18, 2002).

1. Statutory Language

In statutory construction cases, "the first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002) (citation omitted). The plaintiffs argue that the plain language of § 7982 unambiguously requires the Secretary to make transition payments without limitation. They point out that subsection (h) requires payment on eligible production and note that Congress did not limit the definition of "eligible production" in either subsection (a) or (h). They argue that if Congress had intended the cap to apply to transitional payments, it could have written the statute to say so in subsection (h) itself. As the Secretary points out, however, subsection (h) provides that payments shall be made according to the formula in subsection (c),[3] which incorporates the payment quantity in subsection (d), the subsection that includes the payment cap. Thus, according to this reading of the statute, the fact that subsection (h) itself does not include a limitation on quantity

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[3] Subsection (c), entitled "amount," provides as follows:

Payments to a producer under this section shall be calculated by multiplying (as determined by the Secretary) -

(1) the payment quantity for the producer during the applicable month established under subsection (d);
(2) the amount equal to -
  (A) $ 16.94 per hundredweight; less
  (B) the Class I milk price per hundredweight in Boston under the applicable Federal milk marketing order; by
(3) 45 percent.

is not determinative because the payment formula for which it provides incorporates the payment cap in subsection (d)(2).

By its terms, however, the payment cap in subsection (d)(2) applies only to "payments under subsection (b)." Thus, the central question in this case is whether transition payments are "payments under subsection (b)," the section of the statute that orders the Secretary to offer to enter into contracts with dairy farmers under which the farmers will receive payment for eligible milk production. The plaintiffs assert that transition payments are not payments under subsection (b). They maintain that § 7982 creates two similar but distinct programs that cover farmers during different periods - one, described in subsection (e), that covers farmers during the period after they sign contracts and another, described in subsection (h), that covers farmers for the period before they sign contracts - and that "payments under subsection (b)" refers to the payments under the first program, not the second. They argue that interpreting "payments under subsection (b)" to include both transition and monthly payments renders the phrase "subsection (b)" superfluous, since, under such an interpretation, the limitation could have been written to just read: "payments under this section." As the plaintiffs point out, however, citing to *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Goudy*, 777 F.2d 1122, 1127 (6th Cir. 1985), statutes should be read to give every word and clause effect. Citing to other canons of statutory interpretation, the plaintiffs also assert that the statute is remedial and should be construed liberally in favor of the beneficiaries.

In response, the Secretary asserts that transition payments are "payments under subsection (b)." She points out that dairy farmers receive transitional payments only if they sign contracts, as authorized in subsection (b). She further notes

that in excepting payments under subsection (h) from the payments that start on the first day of the month in which the contract is signed, subsection (g)[4] contemplates that payments under subsection (h) are payments covered by the contract. She contends that if Congress had intended to limit the cap to the monthly contract payments, it would have made more sense to have the limit apply to "payments under subsections (e)-(g)," the subsections dealing with the monthly payments, rather than to "payments under subsection (b)," the subsection discussing the contracts in general. Furthermore, the Secretary questions whether the canons of statutory interpretation cited by the plaintiffs are relevant here, arguing that the program is not remedial and that the cap is an eligibility limitation rather than an exception. Finally, she contends that nothing in the structure or purpose of the statute suggests that Congress intended to create two separate programs or to distinguish between the retroactive transitional payments and the prospective monthly payments.

Focusing on the statutory language, we conclude that it is unclear whether the phrase "payments under subsection (b)" includes transition payments or not. As the defendant points out, transition payments are received only if the dairy farmers

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[4] Subsection (g), entitled "duration of contract," provides as follows:

> (1) In general. Except as provided in paragraph (2) and subsection (h), any contract entered into by producers on a dairy farm under this section shall cover eligible production marketed by the producers on the dairy farm during the period starting with the first day of [the] month the producers on the dairy farm enter into the contract and ending on September 30, 2005 . . . .

enter into contracts and, therefore, such payments can be seen to be payments under subsection (b). At the same time, as noted by the plaintiffs, this interpretation does render the phrase "subsection (b)" superfluous. Furthermore, when subsection (e) refers to "a payment under a contract under this section," it is referring to the monthly payments, thereby implying that transition payments are not considered payments under § 7982 contracts. In short, we conclude that although Congress may have had an intent regarding whether transition payments were "under subsection (b)," that intent is not stated clearly in the language of the statute.

2. Legislative History, Structure, and Purpose

Neither the legislative history of the statute nor the parties' explanations of how their interpretations further the purpose of the statute sufficiently clarify the ambiguity in the statutory language. *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 157 L. Ed. 2d 1094, 124 S. Ct. 1236, 1248 (2004) (looking to text, structure, purpose, and history of Act to find it unambiguous); *United States v. Choice*, 201 F.3d 837, 841 (6th Cir. 2000) (explaining that the plain language of the statute is the starting point for statutory interpretation, but that the structure and language of the statute as a whole can aid in interpreting the plain meaning and that legislative history can be looked to if the statutory language is unclear).

Both parties are able to explain how their position fits into the overall structure of the statute and furthers the statute's purpose. The Secretary asserts that her interpretation of the statute gives the cap a meaningful role in the statute's operation, whereas the plaintiffs' interpretation would largely nullify the cap because large producers would be able to circumvent the cap by waiting until September 2005 to sign

a contract and then receive "transitional payments" for the entire period between December 2001 and August 2005.

The plaintiffs object to this argument and to the district court's acceptance of it, asserting that the district court and Secretary have usurped the role of Congress and injected their own political viewpoints into a carefully-crafted congressional compromise. Furthermore, they argue, Congress intended for large producers to be able to avoid the production caps. They assert that the overall purpose of the program was to assist dairy farmers and that Congress wanted to cover all eligible production, but that it carefully constructed the program in a way that would force large farmers to wait until the end of the covered period if they wanted to receive payments on all their eligible production in order to refrain from encouraging large farmers to further increase production and in order to push costs of the program to later fiscal years.

Similarly, both parties cite legislative history that supports their positions. The plaintiffs claim that the transition payments in § 7982 serve as a replacement for the Northeast Dairy Compact, which did not have production caps. As the Secretary points out, however, the Northeast Dairy Compact was not a federal assistance program but an agreement among Northeastern states to regulate prices. *See Organic Cow, LLC v. Ctr. for New England Dairy Compact Research*, 335 F.3d 66, 67-68 (2d Cir. 2003) (describing the Compact). As the Secretary further notes, previous programs supporting dairy farmers included payment caps or gave discretion to the Secretary, who then capped the amount of milk eligible for assistance. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L No. 105-277, § 1111(d), 112 Stat. 2681 (1998) (providing $ 200 million to provide assistance to dairy producers "in a manner determined by the Secretary"); Dairy Market Loss Assistance

Program, 64 Fed. Reg. 24933 (May 10, 1999) (capping payment to 2.6 million pounds). Similarly, both milk assistance programs that were in the Farm Bill before it went to conference included caps. *See* H.R. 2646, 107th Cong. § 132 (2002) (as amended and passed by Senate) (capping payment at lesser of average quantity of milk in which farmer had interest during each of a specified three-year period or 8 million pounds). In addition, the conference report does not mention a difference between monthly and transition payments with regard to the payment cap, simply noting, in its description of the program, that: "Producers, on an operation-by-operation basis, may receive payments on no more than 2.4 million pounds of milk marketed per year. Retroactive payments will be made covering market losses due to low prices since December 1, 2001." H.R. Conf. Rep. No. 107-424 at 446 (2002), *reprinted in* 2002 U.S.C.C.A.N. 141, 171.

At the same time, the plaintiffs point out that some members of Congress, particularly Senators Leahy and Jeffords, indicated that they understood that the cap in § 7982 was to be applied to the monthly payments and not to transition payments. Senator Leahy, for example, in discussing the Farm Bill's conference report, noted that:

> The prospective "monthly" program which provides monthly payments . . . has a 2.4 million pound cap as set forth in (d). . . . This "limitations" language was inserted out of a concern that an uncapped program would lead to significant increases in production of milk. Also, there was a concern that farmers would reorganize in the future just to get higher payments under the national program.

> These concerns do not apply to the benefits paid out under subsection (h) because farmers would need time machines to go back in the past and increase their production or to change their legal structure retrospectively. Indeed, the amount of production covered by (h) is the amount of "eligible production" as defined in section [7982(a)(2)].

148 Cong. Rec. S4032 (May 8, 2002) (statement of Sen. Leahy).

In sum, looking at the statutory language, legislative history, and overall structure and purpose of the statute, we find the intention of Congress with regard to the application of the subsection (d)(2) cap to transition payments unclear.

3. Reasonableness

Under *Chevron*, if Congress has not spoken directly to the question at issue, the Secretary's interpretation of the statute will be upheld so long as it is reasonable. *See Smiley v. Citibank (S.D), N.A.*, 517 U.S. 735, 744-45, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996) ("Since we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one."); *see also Barnhart v. Thomas*, 124 S. Ct. at 382. In this instance, we conclude that the Secretary's interpretation of the statute is eminently reasonable. As discussed above, transition payments pursuant to subsection (h) could rationally be considered payments under subsection (b), because they are contingent upon the recipients signing contracts authorized under subsection (b). Furthermore, capping the transition payments along with the monthly payments creates a

consistency throughout the program and ensures that the cap has a meaningful role in the statute.

CONCLUSION

For the reasons set out above, we find that the Secretary's construction of the statute was permissible, and we therefore AFFIRM the judgment of the district court in favor of the defendant.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. 3:02CV7431

[Dated: May 19, 2003]

Michael Fullenkamp, et al., *Plaintiffs,*	)
v.	)
Ann M. Veneman, in her capacity as Secretary of the United States Department of Agriculture, *Defendant.*	)

Judge Ann Aldrich

MEMORANDUM AND ORDER

The plaintiffs, fifty-six diary producers (the "dairy producers"), bring this action against the Secretary of the United States Department of Agriculture, Ann Veneman (the "Secretary"), challenging the Secretary's regulations under 7 U.S.C. § 7982 and alleging, *inter alia,* that the Secretary improperly limited certain payments to producers. Now

before the Court are two motions: (1) the dairy producers' motion for a writ of mandamus, declaratory relief and preliminary injunctive relief (docket no. 24)[1]; and (2) the Secretary's motion to dismiss, or, in the alternative, for summary judgment (docket no. 31). For the following reasons, this Court denies the dairy producers' motion and grants the Secretary's motion to dismiss.

I. Background

The facts in this case are uncontested. On May 13 2002, President Bush signed into law the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title I, §§ 1501-1508, 1601-1618, 116 Stat. 134 (2002) (the "Act"). The Act created a long-term assistance program for dairy farmers called the Milk Income Loss Compensation Program (the "MILC Program"), 7 U.S.C. § 7982.[2] Designed to contribute

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[1] While the dairy producers have titled their motion as one for a "preliminary injunction,"the dairy producers seek permanent injunctive relief in their motion and supporting memoranda. Accordingly, the Court will address the dairy producers' motion as one seeking permanent, rather than preliminary, injunctive relief.

[2] Prior to the creation of the MILC Program, Congress provided dairy market loss assistance in 1999, 2000 and 2001 through its annual Agriculture Appropriations Acts. In each act, Congress appropriated funds and directed the Secretary to provide assistance to dairy farmers in a manner to be determined by the Secretary. Upon passage of the first act in 1999, the Secretary created the Dairy Market Loss Assistance Program ("DMLA Program"). Under this first DML A Program, and sub sequent DMLA Programs in 2000 and 2001, the Secretary issued regulations that favored small dairy farmers by limiting the amount

to an extensive farm income support program, the MILC Program authorizes the Commodity Credit Corporation ("CCC") to make direct payments to dairy farmers in the United States when a price index falls below a certain level. To achieve that end, Congress promulgated the following payment scheme:

> (b)Payments. The Secretary shall offer to enter into contract with producers on a dairy farm located in a participating State under which the producers receive payments on eligible production.
>
> (c)Amount. Payments to a producer under this section shall be calculated by multiplying (as determined by the Secretary) -
>
> > (1) the payment quantity for the producer during the applicable month established under subsection (d);
> >
> > (2)the amount equal to-
> >
> > > (A) $ 16.94 per hundredweight; less
> > >
> > > (B) the Class I milk price per hundredweight in Boston under the applicable Federal milk marketing order; by
> >
> > (3) 45 percent,

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of assistance a farmer could receive based on a farmers's production volume. In 1999 and 2000, the Secretary set the cap on eligible production at 2.6 million pounds of milk. In 2001, the cap was set at 3.9 million pounds.

(d) Payment quantity

(1) In general. Subject to paragraph (2), the payment quantity for a producer during the applicable month under this section shall be equal to the quantity of eligible production marketed by the producer during the month.

(2) Limitation. The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments under subsection (b) shall not exceed 2,400,00 pounds. . .

* * *

(f) Sign up. The Secretary shall offer to enter into contracts under this section during the period beginning on the date that is 60 days after the date of enactment of this Act [enacted May13, 2002] and ending on September 30, 2005.

(g) Duration of contract.

(1) In general. Except as provided in paragraph (2) and subsection (h), any contract entered into by producers on a dairy farm under this section shall cover eligible production marketed by the producers on the dairy farm during the period starting with the first day of the month the producers on the dairy farm enter into the contract and ending on September 30, 2005.

* * *

(h) TRANSITION RULE.—In addition to any payment that is otherwise available under this section, if the producers on a dairy farm enter into a contract under this

section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) on the quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.

7 U.S.C. § 7982 ("§ 7982").

This payment scheme provides for two categories of payments: (1) payments pursuant to § 7982(b) ("Contract Payments"); and (2) payments pursuant to § 7982(h) ("Transition Payments"). Under the Act, a producer, upon entering into a contract with the Secretary pursuant to § 7982(b) (a "Contract"), (1) receives a Transition Payment—a retrospective lump-sum payment for the period from December 1, 2001 until the producer enters into a Contract; and (2) begins receiving Contract Payments—prospective monthly payments beginning from the time the producer enters into a Contract until the Act expires on September 30, 2005. In other words, a producer receives no payment until the producer enters into a Contract. Once the producer enters into a Contract, the producer receives a lump-sum Transition Payment and also begins receiving monthly Contract Payments.

On October 18, 2002, the Secretary issued regulations implementing the MILC Program.[3] *See* Final Rule, 67 Fed.

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[3] In the Act, Congress directed the Secretary and the CCC to promulgate "such regulations as are necessary" to

Reg. 64454-57, 64476-80, codified at 7 C.F.R. § 1430. Prior to issuance of the Final Rule, however, the Secretary, in implementing the MILC Program, made a number decisions relevant to this case.[4] First, the Secretary determined that Transition, as well as Contract, Payments are subject to the production cap set forth in § 7982(d)(2) (the "Cap"). *See* 7 C.F.R. § 1430.207(b). Under the Cap, the maximum quantity of eligible production for which a dairy operation is eligible for payment during any fiscal year is 2.4 million pounds of milk. See id.

Second, on August 13, 2002, the Secretary began accepting applications from eligible producers to enter into a Contract, and the Secretary designated September 2002 as the first month on which Contract Payments could be based. *See* Notice LD-524, Announcing the Milk Income Loss Contract (MILC) Program (Aug. 9, 2002). The Secretary further provided producers a choice concerning fiscal year 2002 payments which permitted producers to select the portion of the year in which they could use their 2.4 million pound eligibility. A producer could sign a Contract in August 2002, without designating a start month for Contract Payments, and receive a Transition Payment for the period from December 2001 through August 2002 and Contract Payments beginning in September 2002. *See* 7 C.F.R. § 1430.206(b). Conversely,

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implement the title without regard to the Statement of Policy of the Secretary of Agriculture relating to notices of proposed rulemaking and public participation in rulemaking, or to the notice and comment provisions in 5 U.S.C. § 553. *See* Act § 1601(c)(2).

[4] These decisions eventually became part of the regulations, and the citations are to the final regulations.

a producer could elect to forego a Transition Payment for fiscal year 2002 and designate September 2002 as the start date to begin receiving Contract Payments. *See* 7 C.F.R. § 1430.206(c). Because of the variability of payment rates during the course of a year pursuant to the formula in § 7982(c), this rule benefitted large producers who would reach the Cap during lower paying winter months, rather than during the higher paying month of September.[5]

On November 1, 2002, the dairy producers filed their second amended complaint challenging the Secretary's regulations and faulting the Secretary for not allowing dairy producers to begin receiving Contract Payments for milk production beginning in July 2002. First, the dairy producers challenge the Secretary's regulation providing that Transition, as well as Contract, Payments are subject to the Cap. *See 7 C.F.R.* § 1430.207(b), § 1430.208(d). Second, the dairy producers challenge the Secretary's failure to offer Contracts by July 2002 pursuant to § 7982(f). Related to the second challenge, the dairy producers also challenge the Secretary's requirement that dairy producers elect to enter into a Contract no later than the fifteenth of the month before the month for which payments is sought. *See* 7 C.F.R. § 1430.205(a).

The dairy producers seek a declaratory judgment and an injunction ordering the Secretary to amend the regulations to permit uncapped Transition Payments. The dairy producers also seek an order compelling the Secretary to permit producers to designate retroactively July or August 2002 as

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[5] For instance, in December 2001, the payment rate was .77; while in September 2002, the payment rate was 1.4535. *See* Pl's Memo.in Support at 6 (citing http://www.fsa.usda.gov/dafp/psd/milc.htm (Nov. 4, 2002)).

their Contract Payments start date, while still waiving fiscal year 2002 Transition Payments, and to permit dairy producers to designate the month they sign a Contract as the start month for Contract Payments. On December 20, 2002, the Secretary filed a motion to dismiss, or, in the alternative, for summary judgment. On March 21, 2003, this Court held a hearing on the parties' motions.

II. Analysis

A. Exhaustion of Administrative Remedies

The Secretary first argues that this Court lacks subject matter jurisdiction over the dairy producers' claims because the dairy producers failed to exhaust their administrative remedies by failing to seek administrative relief with the Secretary. The dairy producers do not dispute that they failed to exhaust any administrative remedies, but argue that neither law nor the Secretary's regulations require the dairy producers to exhaust their administrative remedies in this instance. This Court agrees with the dairy producers.

Under the Administrative Procedures Act ("APA"), agency action is subject to judicial review only "[w]hen an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule." *Darcy v. Cisneros,* 509 U.S. 137, 146 (1993). With respect to the United States Department of Agriculture ("USD A"), Congress has provided that:

> a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against - (1) the Secretary;

> (2) the Department; or (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e) ("6912"). USDA regulations, in turn, define when the USDA's administrative appeal procedures are available. The regulations permit parties to contest "adverse decisions" made by the USDA within the National Appeals Division of the USDA. *See* 7 C.F.R. § 11.3(a). However, the regulations make clear that "[t]he procedures. . .may not be used to seek review of statutes orUSDA regulations issued under Federal Law." 7 C.F.R. § 11.3(b) ("11.3").

In *Gold Dollar Warehouse Inc. v. Glickman,* 211 F.3d 93 (4th Cir. 2000), the Fourth Circuit considered a challenge brought by tobacco warehouses (the "warehouses") to an assessment of tobacco marketing quota penalties by the USDA. While the district court dismissed the warehouses' claims, the USDA cross-appealed from, *inter alia,* the district court's rejection of its argument that the district court lacked subject matter jurisdiction over the dispute because the warehouses had not exhausted their administrative remedies. After noting the relationship between §§ 6912 and 11.3, the Fourth Circuit concluded that one of the warehouses' claims—-claim that the USDA's regulations exceeded the scope of a federal statute—constituted a facial challenge to the regulations. The court consequently held that "[a]s a direct facial challenge to the regulations, this argument cannot be brought within the agency's appellate process because, as noted, [§ 11.3] precludes agency review of USDA regulations. Administrative exhaustion is accordingly not required before suit upon this theory may be brought in federal court." *See Gold Dollar,* 211 F.3d at 99.

Conversely, the court held that two other of the warehouses' claims did require administrative exhaustion. *See*

Gold Dollar, 211 F.3d at 99-100. The court concluded that a challenge to an application of the USDA's regulations, as opposed to a facial challenge to the authority of the USDA to promulgate regulations under a statue, does require exhaustion of administrative remedies. *See id.* at 99. In that case, there existed an "antecedent factual question of whether the warehouses" in fact violated the USDA's regulations. *See id.* at 99-100. The court held that such an issue "is unquestionably one for the agency in the first instance." *See id.*

In this case, the dairy producers have asserted three challenges, all of which constitute a facial challenge to the Secretary's authority to act or promulgate certain regulations under § 7982. The dairy producers essentially argue that the Secretary's actions and regulations exceed the scope of § 7982. In other words, if the dairy producers are correct that § 7982 does not permit the Secretary to (1) impose a cap on Transition Payments; (2) require dairy producers to sign a Contract prior to the month in which they are to begin receiving payments; or (3) not offer Contracts until August 2002, "there are no circumstances under which the regulations [promulgated by the Secretary] could be lawfully applied." *See Gold Dollar*, 211 F.3d at 99. Thus, the dairy producers' challenges cannot be brought within the Secretary's appellate process because § 11.3 precludes such review, and the Secretary has otherwise pointed to no other administrative appeal procedures "established by the Secretary or required by law" that require the dairy producers to exhaust their administrative remedies prior to filing suit. *See* § 6912.

The Secretary argues, however, that the Second Circuit "split" from the Fourth Circuit on this issue and that the Supreme Court has recently resolved the "split." First, the

Secretary argues that *Bastek v.Federal Crop Ins. Corp.*, 145 F.3d 90 (2d Cir. 1998) holds that § 6912's exhaustion requirement is jurisdictional, and a party making a facial challenge to a USDA regulation must exhaust its administrative remedies prior to filing suit.[6] *See* 145 F.3d at 94-95. While *Bastek* does indeed hold this, *Bastek*, unlike *Gold Dollar*, failed to address § 11.3. It is, therefore, not clear that the circuits are actually "split" on the issue. Further, the one other court to address § 11.3 held that a party need not exhaust its administrative remedies prior to filing suit, although for reasons different from those in *Gold Dollar*. *See McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973 (9th Cir. 2002). In *McBride*, the court held that, while § 6912 did require the court to apply judicial

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[6] There are currently two types of exhaustion doctrine applied by the courts: (1) exhaustion mandated by federal statute (known as "statutory" or "jurisdictional" exhaustion); and (2) exhaustion imposed through the judicially-created doctrine of exhaustion (known as "judicial" or "common-law" exhaustion). Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. *See Bastek*, 145 F.3d at 94; (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (internal citations omitted); *see also McBride*, 290 F.3d at 980 (noting, however, that "not all statutory exhaustion requirements are created equal"and that only certain statutory requirements deprive a federal court of jurisdiction). Judicial exhaustion doctrine recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process. *See, e.g. Costantino v. TRW, Inc.*, 13 F.3d 969, 974 (6th Cir. 1994) ("[t]raditional exhaustion principles, however, include an exception for instances 'when resort to the administrative route is futile or the remedy inadequate.'") (citing *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980)).

exhaustion doctrine, § 6912 was not jurisdictional. *See McBride,* 290 F.3d at 980-81. The court went on to hold that, because pursuant to § 11.3 there is no process by which the plaintiffs could pursue their facial challenges to the USDA's policy, a suit would not interfere with the USDA's process and, thus, an exception applied to the judicial exhaustion doctrine under which the plaintiffs' were not required to exhaust their administrative remedies. *See id.* Thus, the weight of authority actually addressing § 11.3 stands for the proposition that a party making a facial challenge to the USDA's regulations need not exhaust its administrative remedies prior to filing suit.

The Secretary then argues that the Supreme Court's decision in *Booth v. Churner,* 532 U.S 731 (2001) resolved the "split" between the Second and Fourth Circuits.[7] In *Booth,* the Supreme Court held that the Prison Litigation Reform Act ("PLRA") requires administrative exhaustion even where the grievance process does not permit an award of damages and the prisoner seeks only money damages, as long as the grievance tribunal has authority to take some responsive action. *See Booth v. Churner,* 532 U.S. 731 (2001). The Secretary argues that *Booth's* holding "squarely controls the result here" in that, even though the USDA cannot provide the dairy producers a remedy, the dairy producers are required to go to the USDA first before filing suit. Def s Reply Brief at 3. The Secretary's argument is misplaced.

The PLRA provides that:

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[7] This Court notes, however, that the Ninth Circuit decided *McBride* after the Supreme Court decided *Booth.*

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (1994 ed. Supp. V). Before discussing the meaning of the phrase"administrative remedies as are available," the Supreme Court first noted that neither party *"denies that some redress* for a wrong is presupposed by the statute's requirement of an 'available remed[y]' [and that] neither argues that exhaustion is required where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to the complaint." *See Booth,* 532 U.S. at 736 (emphasis added) (citing 42 U.S.C. § 1997e(a)). Thus, the situation that the Supreme Court noted it was not facing in *Booth* is exactly the situation facing this court. The parties do not dispute that the USDA lacks the authority, pursuant to § 11.3, to provide any form of relief in response to the dairy producers' complaint.

The Secretary argues, however, that a decision by the USDA stating that the dairy producers' claims cannot be appealed pursuant to § 11.3 constitutes a response sufficient to place this case within the purview *of Booth. Booth,* however, focused on the availability of some remedy, even if not the exact remedy sought by the prisoner. *See id.* In this case, no remedy is available. Indeed, appeal procedures are not even available to the dairy producers.

This Court concludes, therefore, that, because the dairy producers are bringing a facial challenge to the Secretary's authority to act, § 11.3 precludes agency review and does not require the dairy producers to exhaust their administrative remedies. *See Gold Dollar,* 211 F.3d at 99.Further, even if

the judicial exhaustion doctrine were applicable in this instance, § 11.3 would make an appeal to the USDA futile and, thus, an exception applies to the judicial exhaustion doctrine in this case under which the dairy producers are not required to exhaust their administrative remedies. *See McBride,* 290 F.3d at 980-81; *see also Costantino v. TRW, Inc.,* 13 F.3d at 974. This Court, therefore, will now consider the merits of the dairy producers' claims.

B. Whether the Secretary Erred in Interpreting § 7982 to Make Transition Payments Subject to the Cap

The primary dispute between the parties centers on whether the Act makes Transition, as well as Contract, Payments subject to the Cap. While the Secretary argues that her interpretation of § 7982 making Transition Payments subject to the Cap is lawful, the dairy producers argue that the Cap unambiguously applies only to Contract Payments. In reviewing a challenge to an agency's interpretation of a statute, the Supreme Court has held that, if the statute speaks clearly "to the precise question at issue," we "must give effect to the unambiguously expressed intent of Congress." *Barnhart v. Walton,* 122 S.Ct. 1265, 1269 (2002) (citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984)). If, however, the statute "is silent or ambiguous with respect to the specific issue," we must sustain the Agency's interpretation if it is "based on a permissible construction" of the Act. *Barnhart,* 122 S.Ct. at 1269 (citing *Chevron,* 467 U.S. at 843). In applying this "permissible construction" standard, a court must uphold an agency construction if it is "permissible" and "reasonable," even if it is not the only construction an agency might have adopted and even if it is not the one that a court would have adopted. *TNS, Inc. v. N.L.R.B.,* 296 F.3d 384, 389 (6th Cir. 2002) (citing *Chevron,* 467 U.S. at 843-44 n.1 1). Thus, this

Court must decide (1) whether § 7982 unambiguously forbids the Secretary's interpretation, and, if not, (2) whether the Secretary's interpretation, for other reasons, exceeds the bounds of the permissible. *See Barnhart,* 122 S.Ct. at 1269.

First, § 7982 does not unambiguously forbid the Secretary's regulation making Transition Payments subject to the Cap. The dairy producers point to several phrases in § 7982 to support their argument that the Cap applies only to Contract Payments and not Transition Payments. First, the dairy producers point to the language of the Cap itself which provides that ". . .payments *under subsection (b)* shall not exceed 2,400,000 pounds." § 7982(d)(2) (emphasis added). The dairy producers also point to the language of the Transition Payment provision, which opens *"[i]n addition* to any payment that is otherwise available under this section. . ." § 7982(h) (emphasis added). The dairy producers argue that these provisions identify a Transition Payment as one that is distinct from Contract Payments. The dairy producers also note that every other place within § 7982 that could create a cap on Transition Payments fails to do so. Thus, under the dairy producers' reading of § 7982, Congress intended to create two separate, alternative payment programs from which dairy producers can choose, one of which is subject to the Cap and another which is not. With respect to § 7982(d), therefore, the dairy producers argue that § 7982(d)(1) applies to Transition Payments and § 7982(d)(2), the Cap, applies only to Contract Payments.

Conversely, the Secretary argues that Congress did not intend to create alternative payment programs, but rather that Transition Payments were merely designed to cover the lag between the USDA's prior benefit program and the start of the MILC Program. In other words, Transition Payments were designed to complement, rather than to compete, with

Contract Payments. To support her argument, the Secretary first points to the structure of § 7982. Sections (a) through (g) of § 7982 define the component parts of the MILC Program. Then, in the very last subsection, § 7982(h), Congress created the "Transition Rule." The Secretary argues that, because Transition Payments are provided for in a single subsection at the end of § 7982, Congress did not intend that they constitute an alternative program to the MILC Program.

Further, the Secretary argues that a close reading of § 7982 supports her position. The Secretary notes that under § 7982(h), if certain conditions are met, the Secretary must make a payment "in accordance with the formula specified in subsection (c). . ." § 7982(h). Section 7982(c), which provides the formula by which the Secretary must calculate all payments under the MILC Program, including Transition Payments, looks to § 7982(d) for one part of its formula. *See* § 7982(c)(1) (providing that "the payment quantity for the producer during the applicable month established under subsection (d)."). Section 7982(d)(1), in turn, provides the general rule concerning payment quantity, and § 7982(d)(2) then subjects payments to a cap of 2.4 million pounds. *See* § 7982(d). The Secretary argues that, because Transition Payments are calculated in the same manner as Contract Payments—based on the formula in § 7982(c)—Congress plainly intended that all payments be subject to the Cap.

With respect to the dairy producers' argument that the "under subsection (b)" language of § 7982(d)(2) means that the Cap applies only to Contract Payments, the Secretary makes two arguments. The Secretary first argues that Transition Payments are available only to those producers who first enter into a Contract under § 7982(b), rendering all payments subject to § 7982(b). The Secretary also argues that the dairy producers' reading would render meaningless the

respective titles of § 7982(d)(1) and (2), "In General" and "Limitation" respectively.

While there is logical support for the dairy producers' argument that the Cap applies only to Transition Payments, upon review of § 7982 and the parties' arguments,[8] this Court agrees with the Secretary that § 7982 does not unambiguously forbid the Secretary's interpretation. As its core, this dispute turns on a particular reading of § 7982(d). The dairy producers contend that § 7982(d)(1) applies to Transition Payments and § 7982(d)(2) applies to Contract Payments. The language of § 7982, however, does not forbid the Secretary's reading—that § 7982(d)(1) defines payment quantity generally and § 7982(d)(2) adds a cap for payments going to large producers. Further, the Secretary correctly notes that the Transition Payment provision, § 7982(h), directs one to the payment formula, § 7982(c), which, in turn, directs one to the provision containing the Cap, § 7982(d). The Secretary, therefore, credibly argues that § 7982(h) is, in essence, controlled by § 7982(d). Thus, because § 7982 credibly admits of multiple interpretations, this Court cannot find under *Chevron's* threshold inquiry that § 7982 unambiguously subjects only Contract Payments to the Cap.

Second, the Secretary's regulation is "permissible." In support of their argument that the Secretary's interpretation is not permissible, the dairy producers rely primarily on comments made by Senator Leahy prior to the Senate vote to approve the conference version of the Act. Senator Leahy stated that

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[8] No other court has addressed the Secretary's regulations under § 7982.

> the goal of subsection (b) is for those farmers was to hold them harmless regarding the loss of Congressional consent to the Compact. A second goal, since this is now a national program, is to compensate all dairy farmers for their market losses-not just New England farmers-since December 1, 2001. *Of course, that is a different goal than the prospective "monthly" program which provides monthly payments, for future months when they are due, and operates until September 30, 2005. That prospective program has a 2.4 million pound cap as set forth in (d).*

148 Cong. Rec. S4032 (daily ed. May 8, 2002) (emphasis added). The dairy producers argue that Senator's Leahy's comments support their theory that Congress intended a generous Transition Payment to provide dairy producers more complete economic relief than that available under the Contract Payments provision of§ 7982. The dairy producers also point to the Act's history to argue that Congress recognized that dairy farmers had been hurt by a particularly weak milk market and the failure of Congress to enact a dairy market loss assistance program for fiscal year 2002.

The Secretary, however, finds support in the congressional record for her interpretation. For instance, the conference report, making no mention of uncapped payments, states that "[p]roducers, on an operation-by-operation basis, may receive payments on no more than 2.4 million pounds of milk marketed per year. . ." H.R. Con, Rep. No. 107-424, 2002 U.S.C.C.A.N. 171-73 (May 1, 2002).The conference report further states that

> The Managers understand that previous Dairy Market Loss Assistance Programs [as described in footnote 2] provided discretion to the Secretary to limit payments to individual dairy operations. It is the intent of the

> Managers that this program shall be administered in the same manner, thereby limiting payments on an operation-by-operation basis. . .

See id.

In addition, the dairy producers' reading of § 7982 would lead to a strange, if not absurd result, which would render all but § 7982(h) of § 7982 a nullity for all dairy producers with production over 2.4 million pounds per year. *See Deja Vu of Nashville v. Metropolitan Govt. of Nashville,* 274 F.3d 377, 397 (6th Cir. 2001) ("[i]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") (citing *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564,575 (1982)). Under the dairy producers' theory, Congress intended that a large dairy could wait until September 2005, the last month of the MILC Program, to sign a Contract and receive a lump-sum uncapped Transition Payment on its eligible milk production over a four year period. Such a theory, however, would lead to an odd result and further would be inconsistent with other comments made by Senator Leahy not cited by the dairy producers. For instance, Senator Leahy characterized Transition Payments as "retroactive payments," which Senator Leahy stated producers should receive "at the same time they receive their first payments *in the fall* [of 2002]." 148 Cong. Rec. S3979-05, S4032 (emphasis added).

In short, there is evidence to support the interpretations adopted by both sides. The question, therefore, comes down to one of standard of review. In this case, Congress's intention this specific issue is ambiguous, and therefore, this Court must apply the deferential *Chevron* standard of review to the Secretary's interpretation. Under that standard, this

Court need only conclude that the Secretary's interpretation falls within the "bounds of the permissible." *See Barnhart*, 122 S.Ct. at1272); see also TNS, 296 F.3d at 390 (despite case law and logical support for the opposing position, "in the absence of an express congressional imperative one way of the other, the *Chevron* standard serves to protect the [agency's] interpretation as long as it is reasonable."). Based upon the Act's basic objectives and Congress's stated intention, as enunciated by Congress in the Act's conference report, this Court concludes that the interpretation put forth by the Secretary is both permissible and reasonable. This Court, therefore, must uphold the Secretary's determination that the Cap applies to both Contract and Transition Payments.

C. Whether the Secretary Erred by Failing to Offer Contracts in July 2002 and by Requiring Producers to Enter into a Contract in the Month Prior to the Month the Contract Takes Effect

The dairy producers bring two related, secondary challenges. First, the dairy producers challenge the Secretary's August, rather than July, offering of Contracts. Second, the dairy producers challenge the Secretary's requirement that, to receive Contract Payments beginning in September 2002, a producer must have entered into a Contract by August 15, 2002. When these challenges are read together, the dairy producers are essentially challenging the Secretary's failure to permit producers to enter into a Contract in July 2002 and to begin receiving Contract Payments for July 2002 milk production.

The Secretary does not dispute that she first offered producers the opportunity to sign a Contract on August 13, 2002, thereby missing the statutory deadline by one month.

See § 7982(f)("[t]he Secretary shall offer to enter into contracts under this section during the period beginning on the date that is 60 days after the date of enactment of this Act [enacted May 13, 2002]. . ."). Nor does the Secretary dispute that a producer who wanted to receive Contract Payments for September 2002 production had to decide to enter into a Contract by the fifteenth of the prior month in contravention of § 7982(g)(1). *See* 7982(g)(1) ("any contract entered into by producers on a dairy farm under this section shall cover eligible production marketed by the producers on the dairy farm during the period *starting with the first day of the month the producers on the dairy farm enter into the contract")* (emphasis added). The Secretary argues, however, that the dairy producers lack standing to challenge the Secretary's acts and that the dairy producers' claims have been rendered moot.[9]

Supreme Court case law has established three elements as "the irreducible constitutional minimum of standing. . ." *See Sault Ste. Marie Tribe of Chippewa Indians v. United States,* 288 F.3d 910, 914 (6th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).[10] The

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[9] Because the Court concludes that the dairy producers lack standing to challenge the Secretary' s unlawful acts, the Court does not reach the Secretary's mootness argument.

[10]A party seeking to obtain judicial review of agency action pursuant to § 10(a) of theAPA, 5 U.S.C. § 702, must also be able to demonstrate what the Supreme Court calls "prudential standing," *i.e.*, that the interest sought to be protected must arguably be within the "zone of interests" protected or regulated by the state in question. *See Sault Ste. Marie Tribe of Chippewa Indians,* 288 F.3d at 914. The Secretary does not dispute that the dairy producers meet this test.

elements are these:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or immanent, not "conjectural" or "hypothetical. Second, there must be a causal connection between the injury and the conduct complained of— the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (quoting *Lujan,* 504 U.S. at 560-61) (citations omited). The Secretary argues, *inter alia,* that the dairy producers lack standing because the acts challenged by the dairy producers—the Secretary's failure to offer Contracts and to begin making Contract Payments in July 2000—did not cause the dairy producers' alleged injury.

In implementing the MILC Program, the Secretary, as noted above, made the decision to provide producers a choice concerning when producers could begin calculating milk production. First, a producer could choose to enter into a Contract in August 2002, without designating a start month for Contract Payments, and receive a Transition Payment for the period from December 2001 through August 2002 and begin receiving Contract Payments in September 2002. *See* 7 C.F.R. § 1430.206(b).Conversely, a producer could elect to forego a Transition Payment for fiscal year 2002 and designate September 2002 as the start date to begin receiving Contract Payments. *See* 7 C.F.R. § 1430.206(c). Again, this second option benefitted large dairy producers who would reach the Cap during the lower paying winter months of

2002, rather than during the higher paying month of September 2002.

The dairy producers argue that a producer could conceivably have been injured by the Secretary's failure under the second option to offer Contracts and begin making Contract Payments in July 2002.[11] Because each month has its own rate of payment, when a producer enters into a Contract is critical. For a producer whose production typically reaches the Cap after a period of several months, the ability to choose between the higher paying summer months over the lower paying winter months results in substantially different payments. Thus, the dairy producers argue that a producer who chose the second option and did not exceed the Cap in September 2002 alone was arguably injured by the Secretary's failure to offer Contracts and begin making Contract Payments in July 2002.

The dairy producers' argument, however, is misplaced. The dairy producers are challenging the Secretary's failure to offer Contracts and begin making Contract Payments in July 2002, which the Secretary admits violates § 7982. The injury alleged by the dairy producers, however, arises from the Secretary's decision to permit a producer to begin calculating Cap eligibility in September 2002 as opposed to July 2002. In other words, what the dairy producers are essentially arguing is that § 7982 required the Secretary to not only offer

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[11] The parties dispute whether the dairy producers have submitted sufficient evidence demonstrating that any of the dairy producers actually were injured by the Secretary's acts. Because the Court concludes that the unlawful acts challenged by the dairy producers did not cause the dairy producers' alleged injury, the Court also does not reach this point.

Contracts and begin making Contract Payments in July 2002,but that it also required the Secretary to permit producers to begin calculating Cap eligibility for fiscalyear2002 milk production in July 2002.

There is no dispute, however, that the Secretary could have simply required producers to begin calculating Cap eligibility in December 2001. In other words, the Secretary was under no obligation to permit producers to waive 2002 Transition Payments and to begin calculating fiscal year 2002 Cap eligibility in September 2002 or, for that matter, July 2002. The dairy producers' alleged injury, therefore, stems both from the Secretary's delay in offering Contracts and making Contract Payments available and from the Secretary's decision to give producers the option of foregoing Transition Payments in 2001 and to begin calculating Cap eligibility in September 2002 as opposed to July 2002. This second decision by the Secretary, however, is not challenged as unlawful by the dairy producers and, indeed, benefitted large producers.

In short, while the Secretary may have violated § 7982 by failing to offer Contracts and begin making Contract Payments in July 2002, the Secretary's failure to offer timely Contracts alone did not cause the injury alleged by the dairy producers. Rather, the dairy producers' alleged injury is based on the Secretary's unchallenged, discretionary decision to not permit producers to begin calculating Cap eligibility in July 2002. Therefore, because the acts challenged by the dairy producers did not cause their alleged injury, the dairy producers lack standing to challenge those acts. Accordingly, this Court must dismiss the dairy producers challenge to the Secretary's failure to offer Contracts in July 2002 and to make Contract Payments for the month in which producers entered into a Contract.

CONCLUSION

For the foregoing reasons, this Court denies the dairy producers' motion and grants the Secretary's motion. This case is dismissed. This order is final and appealable.

IT IS SO ORDERED.

s/Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-3731

[Filed: January 6, 2005]

Michael Fullenkamp, et al.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Ann M. Veneman,	)
In her official capacity as Secretary of	)
The United States Department of Agriculture	)
Defendant-Appellee.	)
	)

Before: DAUGHTREY, GIBBONS, and COOK, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

Farm Security and Rural Investment Act of 2002,
Pub.L. No. 107-171, 116 Stat. 134 (2002)
SEC. 1502. NATIONAL DAIRY MARKET LOSS PAYMENTS.
[7 U.S.C. § 7982]

(a) DEFINITIONS.—In this section:

(1) CLASS I MILK.—The term 'Class I milk' means milk (including milk components) classified as Class I milk under a Federal milk marketing order.

(2) ELIGIBLE PRODUCTION.—The term 'eligible production' means milk produced by a producer in a participating State.

(3) FEDERAL MILK MARKETING ORDER.—The term 'Federal milk marketing order' means an order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

(4) PARTICIPATING STATE.—The term 'participating State' means each State.

(5) PRODUCER.—The term 'producer' means an individual or entity that directly or indirectly (as determined by the Secretary)—

(A) shares in the risk of producing milk; and

(B) makes contributions (including land, labor, management, equipment, or capital) to the dairy farming operation of the individual or entity that are at least commensurate with the share of the individual or entity of the proceeds of the operation.

(b) PAYMENTS.—The Secretary shall offer to enter into contracts with producers on a dairy farm located in a participating State under which the producers receive payments on eligible production.

(c) AMOUNT.—Payments to a producer under this section shall be calculated by multiplying (as determined by the Secretary)—

(1) the payment quantity for the producer during the applicable month established under subsection (d);

(2) the amount equal to—

(A) $16.94 per hundredweight; less

(B) the Class I milk price per hundredweight in Boston under the applicable Federal milk marketing order; by

(3) 45 percent.

(d) PAYMENT QUANTITY.—

(1) IN GENERAL.—Subject to paragraph (2), the payment quantity for a producer during the applicable month under this section shall be equal to the quantity of eligible production marketed by the producer during the month.

(2) LIMITATION.—The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments under subsection (b) shall not exceed 2,400,000 pounds. For purposes of determining whether producers are producers on separate dairy operations or a single dairy operation, the Secretary shall apply the same standards as were applied in implementing the dairy program under section 805 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (as enacted into law by Public Law 106-387; 114 Stat. 1549A-50).

(3) RECONSTITUTION.—The Secretary shall promulgate regulations to ensure that a producer does not reconstitute a dairy operation for the sole purpose of receiving additional payments under this section.

(e) PAYMENTS.—A payment under a contract under this section shall be made on a monthly basis not later than 60 days after the last day of the month for which the payment is made.

(f) SIGNUP.—The Secretary shall offer to enter into contracts under this section during the period beginning on the date that is 60 days after the date of enactment of this Act and ending on September 30, 2005.

(g) DURATION OF CONTRACT.—

(1) IN GENERAL.—Except as provided in paragraph (2) and subsection (h), any contract entered into by producers on a dairy farm under this section shall cover eligible production marketed by the producers on the dairy farm during the period starting with the first day of month the producers on

the dairy farm enter into the contract and ending on September 30, 2005.

(2) VIOLATIONS.—If a producer violates the contract, the Secretary may—

(A) terminate the contract and allow the producer to retain any payments received under the contract; or

(B) allow the contract to remain in effect and require the producer to repay a portion of the payments received under the contract based on the severity of the violation.

(h) TRANSITION RULE.—In addition to any payment that is otherwise available under this section, if the producers on a dairy farm enter into a contract under this section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) on the quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.

APPENDIX E

TITLE 7--AGRICULTURE

CHAPTER XIV--COMMODITY CREDIT CORPORATION,

DEPARTMENT OF AGRICULTURE

PART 1430--DAIRY PRODUCTS

Subpart B--Milk Income Loss Contract Program

Sec. 1430.200 Applicability.

Source: 67 FR 64476, Oct. 18, 2002, unless otherwise noted.

(a) This subpart governs the Milk Income Loss Contract Program. This program provides financial assistance to dairy operations in connection with milk production that is sold in the commercial market.

Sec. 1430.201 Administration.

(a) This program is administered under the general supervision of the Executive Vice President, CCC, or a designee, and shall be carried out by Farm Service Agency (FSA) State and county committees and employees.

(b) State and county committees, and their employees may not waive or modify any requirement of this subpart, except as provided in paragraph (e) of this section.

(c) The State committee shall take any action required when not taken by the county committee, require correction of actions not in compliance, or require the withholding of any action that is not in compliance with this subpart.

(d) The Executive Vice President, CCC, or a designee, may determine any question arising under the program or reverse or modify any decision of the State or county committee.

(e) The Deputy Administrator, Farm Programs, FSA, may waive or modify program requirements where failure to meet such requirements does not adversely affect the operation of the Milk Income Loss Contract Program.

(f) A representative of CCC may execute Milk Income Loss Contracts and related documents under the terms and conditions determined and announced by CCC. Any document not under such terms and conditions, including any purported execution before the date authorized by CCC, shall be null and void.

Sec. 1430.202 Definitions.

The definitions in this section shall be applicable for all purposes of administering the Milk Income Loss Contract (MILC) program established by this subpart.

CCC means the Commodity Credit Corporation of the Department.

Class I Milk means milk, including milk components, classified as Class I milk under a Federal milk marketing order.

Contract application means a Milk Income Loss Contract as executed on a form prescribed by CCC.

Contract application period means the date established by the Deputy Administrator for producers to apply for program benefits.

County committee means the FSA county committee.

County office means the FSA office responsible for administering FSA programs to farms located in a specific area in a state.

Dairy operation means any person or group of persons who as a single unit as determined by CCC, produce and market milk commercially produced from cows and whose production facilities are located in the United States.

Department or USDA means the United States Department of Agriculture.

Deputy Administrator means the Deputy Administrator for Farm Programs (DAFP), FSA or a designee.

Eligible production means milk that was produced by cows in the United States and marketed commercially anytime during the period of December 1, 2001, through September 30, 2005, up to a maximum of 2.4 million pounds per dairy operation per fiscal year.

Farm Service Agency or FSA means the Farm Service Agency of the Department.

Federal Milk Marketing Order means an order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

Fiscal Year means the year beginning October 1 (except December 1 for fiscal year 2002) and ending the following September 30 and such that, for example, fiscal year 2003 will run from October 1, 2002 through September 30, 2003.

Hundredweight or cwt. means 100 pounds.

Marketed commercially means sold to the market to which the dairy operation normally delivers whole milk and receives a monetary amount.

MILC means the Milk Income Loss Contract program or the form upon which CCC and the producer agree to the terms of the payment to be made under the MILC program.

Milk handler means the marketing agency to or through which the producer commercially markets whole milk.

Milk marketing means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use.

Participating State means each of the 50 States in the United States of America, including the District of Columbia, and the Commonwealth of Puerto Rico, or any other State, territory, or possession of the United States.

Payment pounds means the pounds of milk production for which an operation is eligible to be paid under this subpart.

Producer means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity who is, or whose members are, a citizen of, or legal resident alien in the United States, and who directly or indirectly, as determined by the Secretary, shares in the risk of producing milk, and makes contributions (including land, labor, management, equipment, or capital) to the dairy farming operation of the individual or entity that are at least commensurate with the share of the individual or entity of the proceeds of this operation.

Transition period means the period from December 1, 2001, until the time the dairy operation enters into MILC contract with CCC, provided that CCC may set such a deadline for the signing of the transition contract as it deems appropriate in order to accomplish the purposes of the contract.

United States means the 50 States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other State, territory, or possession of the United States.

Verifiable production records means evidence that is used to substantiate the amount of production marketed and that can be verified by CCC through an independent source.

Sec. 1430.203 Eligibility.

To be eligible to receive payments under this subpart, a dairy operation must:

(a) Have produced milk in the United States and commercially marketed the milk produced anytime during the period of December 1, 2001, through September 30, 2005;

(b) Enter into a MILC during the contract application period;

(c) Agree to all terms and conditions in the MILC and those that are otherwise contained in this subpart and comply with instructions issued by CCC;

(d) Provide proof of monthly milk production commercially marketed by all persons in the dairy operation during the contract period, to determine the total pounds of milk that will be converted to hundredweight (cwt.) used for payment;

(e) Submit timely production evidence according to Sec. 1430.209;

(f) Be actively engaged in the business of producing and marketing agricultural products at the time of signing the Milk Income Loss Contract.

(g) In administering this program, the eligibility determination of "dairy operation"' shall be made in the same manner as Dairy Market Loss Assistance (DMLA) contracts in that State. New MILC operations must be unaffiliated with prior DMLA operations.

Sec. 1430.204 Requesting benefits.

(a) A request for benefits or contract application, under this subpart must be submitted on a form as prescribed by the Agency. Contract applications shall be submitted to the FSA

office serving the county where the dairy operation is located. Contract applications must be received by FSA by the close of business on the date established by the Deputy Administrator. Contract applications received after such date shall be disapproved.

(b) The dairy operation requesting MILC benefits must certify the accuracy and truthfulness of the information in their contract application. All information provided is subject to verification by CCC. Refusal to allow CCC or any other agency of the Department to verify any information provided will result in disapproval.

(c) Contract applications will be approved by execution by FSA and producer of a MILC. All persons who share in the risk of a dairy operation's total production must sign and certify the contract application.

Sec. 1430.205 Selection of starting month.

(a) Except as provided in Sec. 1430.206 and beginning with the 2003 Fiscal Year, a dairy operation that enters into a MILC, and does not want its payments to begin with the first month of the fiscal year, must designate the starting month that it desires CCC to begin making payments to them. The starting month must be selected on or before the 15th of the month before the month for which payment is sought. A dairy operation cannot select a month for payment which:

(1) Has already begun;

(2) Has already passed; or

(3) During which no milk was produced by the dairy operation.

(b) Dairy operations may change the starting month on or before the first day of 15th of the month before the month previously selected. Otherwise, the starting month cannot be changed until the next Fiscal Year. If the selected starting month is never modified, it will remain the same throughout the duration of the contract.

(c) MILC payments will be made consecutively to the dairy operation on a monthly basis after the starting month has been designated until the earlier of the following:

(1) The maximum payment quantity is reached as determined in accordance with Sec. 1430.207; or

(2) The end of the applicable Fiscal Year.

(d)(1) Dairy operations that do not designate the month to begin receiving payments from CCC will be issued consecutive payments on a monthly basis, on marketed milk production beginning in the first month of the fiscal year, unless FSA is otherwise notified that selection will be made at a later date.

(2) Dairy operations that desire payments to begin with the first month of the fiscal year will receive payments made by CCC consecutively on a monthly basis until the earlier of the following:

(i) The maximum payment quantity is reached as determined in accordance with Sec. 1430.207; or

(ii) The end of the applicable fiscal year.

(e) All producers involved in the dairy operation must agree to the month designated. The dairy operation assumes

the risk of not reaching the maximum payment quantity based on the month selected by the dairy operation. Payments will not be issued for past months for the sole purpose of reaching the maximum payment quantity.

Sec. 1430.206 Transition payments.

(a) MILC program participants shall receive a payment calculated under Sec. 1430.208 on the quantity of eligible production marketed by the dairy operation during the period beginning December 1, 2001, and ending on the last day of the month preceding the month the operation's MILC is executed.

(b) Transition payments are subject to the following:

(1) The maximum payment quantity on eligible production, as described in Sec. 1430.207;

(2) Consecutive monthly payments beginning on December 1, 2001, and if applicable the beginning of the fiscal year thereafter, until the earlier of the following is reached for a particular fiscal year:

(i) The maximum applicable payment quantity is reached as determined in accordance with Sec. 1430.207; or

(ii) The end of the applicable fiscal year.

(c) With respect to the 2002 Fiscal Year, the dairy operation may elect to forgo their transition payment and choose to begin receiving payments in September, 2002 in accordance with Sec. 1430.205.

(d) Notwithstanding any other provisions in this subpart, dairy operations that go out of business after December 1, 2001, may enter into a MILC with CCC for a transition payment on the quantity of eligible production marketed by the dairy operation during the transition period while the dairy operation was in business.

Sec. 1430.207 Dairy operation payment quantity.

(a) The applicant's payment quantity of milk will be determined by CCC, based on the quantity of milk that was produced and commercially marketed by each dairy operation per fiscal year.

(b) The maximum quantity of eligible production for which dairy operations are eligible for payment per any fiscal year, including any in the transition year, under this subpart shall be 2.4 million pounds (24,000 cwt.) per separate and distinct operation. In accordance with these regulations, the Deputy Administrator shall determine what is a separate and distinct operation and that decision shall be final.

Sec. 1430.208 Payment rate and dairy operation payment.

(a) Payments under this subpart may be made to dairy operations when the Boston Class I milk price under the applicable Federal milk marketing order is below $16.94 per cwt. No payments will be made to dairy operations for marketings during the months that the Boston Class I milk price under the applicable milk marketing order exceeds $16.94.

(b) A per-hundredweight payment rate will be determined for the applicable month by:

(1) Subtracting from $16.94 the Class I milk price per cwt in Boston; and

(2) Multiplying the difference, if positive, by 45 percent.

(c) Each eligible dairy operation payment will be calculated, as determined by the Secretary, by:

(1) Converting whole pounds of milk to hundredweight; and

(2) Multiplying the payment rate determined in paragraph (b) of this section by the quantity of eligible production marketed by the operation during the applicable month as determined according to Sec. 1430.205 and other provisions of these regulations.

(d) Payments under this subpart may be made to a dairy operation only up to the first 2.4 million pounds of eligible milk production per applicable fiscal year, including any year in the transition period.

(e) Dairy operations receiving benefits under this subpart, will receive payments on a monthly basis according to the MILC, to the extent practicable, not later than 60 days after the production evidence and all supporting documents for the applicable month are received by CCC. Payments issued by CCC later than 60 days after all production evidence and supporting documentation are received by CCC will be subject to prompt payment interest as allowed by law.

Sec. 1430.209 Proof of marketings.

(a) A dairy operation entering into an MILC must, based on instructions issued by the Deputy Administrator, provide

adequate proof of the dairy operation's eligible production during the months of each fiscal year designated in the MILC. The dairy operation must also provide proof that the eligible production was commercially marketed during the months beginning December 1, 2001, and ending September 30, 2005. Evidence of milk production claimed for payment shall be provided to CCC with supporting documentation under paragraph (b) of this section. All information provided is subject to verification, spot check, and audit by FSA. Further verification information may be obtained from the dairy operation's milk handler or marketing cooperative if deemed necessary by CCC to verify provided information. Refusal to allow FSA or any other agency of the Department of Agriculture to verify any information provided will result in a determination of ineligibility for benefits under this subpart.

(b) Eligible dairy operations marketing milk during the period specified in the MILC shall provide any available supporting documents from all producers in the dairy operation to assist CCC in verifying that the dairy operation produced and marketed milk commercially from the designated starting month and thereafter. Examples of supporting documentation include, but are not limited to: milk marketing payment stubs, tank records, milk handler records, daily milk marketings, copies of any payments received as compensation from other sources, or any other documents available to confirm the production and production history of the dairy operation. Producers may also be required to allow CCC to examine the herd of cattle as production evidence. If supporting documentation requested is not presented to CCC or FSA, the request for MILC benefits will be disapproved.

* * *

Sec. 1430.211 Duration of contracts.

(a) Except as provided in Sec. Sec. 1430.205 and 1430.206, or elsewhere in this subpart, contracts under this subpart entered into by producers in a dairy operation shall cover eligible production marketed by the producers in the dairy operation during the period beginning with the first day of the month the producers in the dairy operation enter into contract and ending on September 30, 2005.

(b) If a dairy goes out of business during the contract period, the MILC will be terminated immediately, except as applicable to earned payments.

* * *

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No. 04-1361

In The Supreme Court of the United States

MICHAEL FULLENKAMP, et al.,

Petitioners,

v.

MIKE JOHANNS, in his capacity as Secretary of the United States Department of Agriculture,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF NEW MEXICO IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* STATE OF NEW MEXICO

Patricia A. Madrid, Attorney General of the State of New Mexico, submits the following statement, which reflects the interest of the State of New Mexico in supporting the Petitioners' Petition for Writ of Certiorari, seeking to overturn a regulation of the Secretary of the United States Department of Agriculture ("Secretary") that penalizes New Mexico's dairy producers.

The penalty results from the Secretary's imposition of a payment limitation on a specific type of payment to dairy producers under the national dairy market loss payment program. The Secretary's action defeats the explicit direction and intent of Congress to recompense, within the limits of the law enacted by Congress, market losses suffered by New Mexico's producers. On a far larger scale, such unwarranted action of the Secretary, if left unchecked, foretells a serious threat to New Mexico's agricultural economy and its booming dairy industry. That threat arises from the Secretary's abuse of authority by adjusting rules that directly contravene Congress' express direction for the nation's dairy market loss payment program. The executive branch's assumption of law-making power is intolerable, especially so here, where New Mexico's economy is dependent to a large extent on her agriculture and, most prominently now, her dairy industry. It is acutely important to New Mexico that the federal government's national dairy and agricultural programs, and Congress' policy decisions that those programs embody, not be overridden or undermined by an officer of the executive branch who seems intent on actively pursuing policies that are contrary to those established by Congress in its laws.

The importance of New Mexico's dairy industry to New Mexico's economy is reflected by the expansion of that industry in New Mexico since 1990. Advancing from 30th in the nation in milk production to 7th in the nation, milk production in New Mexico has increased since 1990 by over 400%. New Mexico is 8th in the nation in total milk cow numbers, 5th in the nation in production per cow, and 1st in the nation in herd size, averaging 1,600 to 1,700. New Mexico is also 8th in the nation in cheese production. There are nearly 300,000 dairy cows in New Mexico and approximately 170 dairies. The average New Mexico dairy farm produces more than 33 million pounds of milk. In 2002, the impact of milk sales on New Mexico's economy was $2.1 billion.

New Mexico has nine fluid milk plants, five cheese plants and plans for the largest cheddar cheese plant in North America. Glanbia, a company based in Kilkenny, Ireland, and its partners in this joint venture, Select Milk Producers and Dairy Farmers of America, selected Clovis, New Mexico, to be the site of this new cheese factory, which is expected to open the second half of 2005. This new cheese factory, when fully operational, is expected to process 2.4 billion pounds of milk annually, producing in excess of 250 million pounds of cheese and 16.5 million pounds of value-added whey proteins. The plant is expected to generate an estimated $340 million in sales.

Clovis, New Mexico, is situated in Curry County, which is adjacent to Roosevelt County, and those two counties are the 15th highest milk producing counties in the nation. The Clovis site for the new cheese plant was chosen, because, according to an executive of Glanbia Foods, it offers access to a very large milk supply, which is important to a plant that requires ongoing output of

88,000 dairy cattle and 180 milk-hauling tankers per day coming to the plant. This eastern area of New Mexico and the surrounding area is, in the estimation of an executive of Glanbia Foods, "one of the country's fastest growing milk sheds for the next ten years."[1]

New Mexico, acting by and though her Attorney General, is interested in preserving and protecting this important segment of her economy from the consequences of rule-making by the executive branch that contravenes Congressional policy as written by Congress in its laws.

ARGUMENT

I. The Secretary of the United States Department of Agriculture's regulations at issue in this case are contrary to the plain language of 7 U.S.C. § 7982. The regulations are invalid to the extent they improperly place the statute's prospective monetary "cap" on the separately provided and uncapped retroactive "transition payments" payable to producers on a dairy farm.

The Farm Security and Rural Investment Act of 2002 extends the life of the milk price support program to December 31, 2007 and enacts a new national dairy market loss payment program, which provides payments whenever market prices fall below $16.94 cwt. (meaning

[1] Information drawn upon for this description of New Mexico's dairy industry and the quoted matter above may be located at: www.conway.com/ssinsider/incentive/ti0309.htm; www.bizjournals.com/Albuquerque/stories/2004/12/27/story2.html; www.nmdairy.org/faq1.htm; www.nmdairy.org; http://nmsu.edu/~dairy (clicking on "NM Dairy Facts"); www.southwestcheese.com (clicking on "FAQ").

per hundredweight) based on Boston prices. If, for example, the Class 1 price for fluid milk in Boston is $14.51 per cwt., 45% of the difference between $16.94 and $14.51 ($2.43) would be paid, producing, in this illustration, a payment of $1.09 per cwt.

This new program, which is also known as the milk income loss contract ("MILC") program, has no set funding level and is open to all dairy producers who, between December 1, 2001 and September 30, 2005, commercially produce and market cow milk in the United States. Sign-up for the program began August 13, 2002 and ends September 30, 2005. Dairy producers can apply for the program benefits anytime during this period.

Dairy producers can receive two types of payments: (1) prospective payments that are made on a monthly basis, no later than 60 days after the applicable month, when the Boston price falls below $16.94 cwt., but up to a maximum of 2.4 million pounds of milk produced and marketed per fiscal year; and (2) retroactive "transition payments" that cover, for payment purposes, the period between December, 2001 and the last day of the month before the month the MILC is entered into by the producer. The transition period lasts from December 1, 2001 until the time the producer enters into the contract.

The prospective monthly payments are subject under the law to a 2.4 million pound per fiscal year limit, but the retroactive "transition payments," which are provided for in a different subsection of the law than that referenced by the prospective "maximum payment" or "capping" language of the statute, are not. The Secretary has nevertheless misconstrued and interpreted the law to allow the Department to apply the prospective "maximum payment"

or "cap" to the retroactive "transition payments," and, therein lays the rub.

Litigation between the parties ensued because of the Secretary's interpretation to apply the prospective "cap" to the retroactive "transition payments." The Court of Appeals below deferred to and agreed with the Secretary's interpretation, embodied in the Department's regulations, even though that requires rendering some statutory language meaningless and violates the plain meaning rule of statutory construction.

At issue before this Court is the validity of regulations promulgated by the Secretary (appendix "E" to Petition for Writ of Certiorari), specifically, 7 C.F.R. §§ 1430.206, 1430.207, 1430.208 and a related definition of "eligible production" (effectively extending the prospective payment "cap" to retroactive "transition payments").[2] These

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[2] Section 1430.206 Transition payments. (b) Transition payments are subject to the following: (1) The maximum payment quantity on eligible production, as described in Sec. 1430.207.

Section 1430.207 Dairy operation payment quantity: (b) The maximum quantity of eligible production for which dairy operations are eligible for payment per any fiscal year, *including any in the transition year*, under this subpart shall be 2.4 million pounds (24,000 cwt.) per separate and distinct operation. . . . (Emphasis added).

Sec. 1430.208 Payment rate and dairy operation payment: (d) Payments under this subpart may be made to a dairy operation only up to the first 2.4 million pounds of eligible milk production per applicable fiscal year, *including any year in the transition period*. (Emphasis added).

Section 1430.202, which defines "eligible production" as "milk that was produced by cows in the United States and marketed commercially anytime during the period of December 1, 2001, through September 30, 2005, *up to a maximum of 2.4 million pounds per dairy operation per fiscal year*." (Emphasis added).

regulations run afoul of 7 U.S.C. § 7982, the authorizing statute, because that statute does not permit the Secretary to impose a monetary "cap" with respect to retroactive "transition payments" payable to producers on a dairy farm.

The regulations of the Secretary that apply to the retroactive "transition payments" cause injury to all affected dairy farmers in a way not contemplated, permitted or directed by Congress. This, we submit, is a clear case of "the tail wagging the dog." *St. Luke's Methodist Hospital v. Thompson*, 182 F. Supp.2d 765, 784 (N.D. Iowa), *aff'd*, 315 F.3d 984 (8th Cir. 2003) (refusing to allow the Secretary of Health and Human Services Department to interpret a regulation in a way that would allow the Secretary to substantively re-write the regulation in a way not contemplated by the regulation or subsequently enacted statutes).

It is important to the proper balance of power for this Court to review the decision of the court below. It is important that an agency's own policy decisions not be accorded untoward and unbridled deference if this results in "the tail wagging the dog" and a contravention of Congressional directive.

The Secretary's regulations, insofar as they impose a "cap" of 2.4 million pounds of eligible milk production upon the retroactive "transition payments," are contrary to 7 U.S.C. § 7982, because that statute limits the Secretary's ability to impose a "cap" to only prospective "monthly" payments, i.e., those monthly payments that flow to the producer after that producer executes a MILC contract. The Secretary has no authority under 7 U.S.C. § 7982 to apply the prospective "cap" to retroactive "transition

payments" and is prohibited from doing so based on 7 U.S.C. § 7982's clear and plain language.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." The clear and unambiguous language of 7 U.S.C. § 7982, specifically its reference to "subsection (b)," referring to the prospective monthly payments, is a clear, plain and unambiguous reflection of Congressional intent and requires rejection of the Secretary's construction that would extend this subsection reference to the retroactive "transition payments" provided for at subsection (h).

7 U.S.C. § 7982 defines "eligible production" at subsection (a)(2) simply as: "[M]ilk produced by a producer in a participating state." Subsection (b) provides: "The Secretary shall offer to enter into contracts with producers . . . under which the producers receive payments on eligible production." Paragraph (2) of subsection (d) provides: "The payment quantity for all producers on a single dairy operation during the months of the applicable fiscal year for which the producers receive payments *under subsection (b)* shall not exceed 2,400,000 pounds. . . . " (Emphasis added).

The "contract" payments "under subsection (b)" are, pursuant to subsection (e), "made on a monthly basis not later than 60 days after the last day of the month for which the payment is made." Under subsection (g)(1): "*Except* as provided in . . . and *subsection (h)* of this section, *any contract* entered into by producers on a dairy farm under this section *shall cover eligible production*

marketed by the producers on the dairy farm *during the period starting with the first day of the month the producers* on the dairy farm *enter into the contract and ending on September 30, 2005.* (Emphasis added).

Subsection (h) is thus an exception to the prospective cap and separately provides for the retroactive "transition payments" at issue here, which are expressly stated as being additional payments, i.e., payments in addition to the prospective "cap" provided in the section:

> *In addition to any payment that is otherwise available* under this section, if the producers on a dairy farm enter into a contract under this section, the Secretary shall make a payment in accordance with the formula specified in subsection (c) on the quantity of eligible production of the producer marketed during the period beginning on December 1, 2001, and ending on the last day of the month preceding the month the producers on the dairy farm entered into the contract.

(Emphasis added).[3]

The first mistake the Secretary made in the regulations is at § 1430.202, in which the Secretary adds to the statutory definition of "eligible production" the language "up to a maximum of 2.4 million pounds. . . . ". That limitation is not in the statute at 7 U.S.C. § 7982(a)(2) and as a result directly contradicts, undermines and thwarts the express statutory directive.

The second, and most grievous, mistake is to attach the 2.4 million pound payment limitation applicable to

[3] 7 U.S.C. § 7982 is contained at appendix "D" to the Petition for Writ of Certiorari.